NO. 19383

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

See also Vol. 3315

JOHN MARSHALL, CHARLES DEL MONICO,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

---

# APPELLANT JOHN MARSHALL'S PETITION FOR REHEARING

---

Appeal From The United States District Court For The Southern District of California, Central Division

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Appellant John Marshall respectfully petitions the Court for a rehearing as to its judgment of January 27, 1966 on the following grounds:

## I

## THIS COURT DID NOT RULE UPON APPELLANT'S POINT THAT HE WAS ENTITLED TO AND DID NOT GET THE UNANIMITY INSTRUCTION.

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In his statement of the Questions Involved, appellant said (pp. 5-6, Op. Br.):

"When the statute under which a defendant is tried sets forth separate offenses or different ways by which the statute can be violated, and the indictment charges in the language of the statute, is not the defendant entitled to an

instruction that the jury must be unanimous as to which offense or offenses they might find had been committed, or as to which particular act or acts they might find had been committed by the defendant."

In his Specification of Errors, Numbers 4(k) and (l) (Op. Br. pp. 9-12), appellant complained of as error, the refusal of the Trial Court to give his requested instructions numbers 48 and 50, on the ground that (pp. 10-11, Op. Br.), "the jury must be instructed that they must be unanimous as to precisely what it is the defendant did, before there can be a valid verdict; that if some of the jury felt defendant did one thing proscribed by the statute, while others felt he did something else, also proscribed by the statute, this would not be the unanimous verdict which is necessary before a jury can convict; that since the gist of the offense is travel with a specific intent, the jury must be unanimous as to just what that intent was and it must be so instructed."

Appellant argued this under his Point II in his Opening Brief (pp. 28-37). Appellee responded thereto under its Point V, C, 2 in its brief (pp. 152-161) and appellant replied under his Point XII in his Reply Brief (pp. 23-25).

This Court in its opinion did not allude to the point nor dispose of it. Appellant respectfully submits that he is entitled to this Court's consideration of the matter.

II

## COUNT THREE OF THE INDICTMENT FAILED TO CHARGE AN OFFENSE UNDER THE STATUTE.

This Court apparently sought to answer appellant's contention by saying (Sl. Op. 6), "Count III, applying to acts in Nevada alone, would necessarily require a violation of the Nevada statutes (Title 16, Nevada Revised Statutes, §205.315 or 205.325)." (footnotes omitted)

Appellant submits that the Court's conclusion does not "necessarily" follow. The statute under which appellant was indicted (18 U.S.C. 1952) requires that the "unlawful activity", both as to the travel in interstate commerce with intent and the "thereafter" acts, be in violation of the State in which committed "or of the United States". There is nothing in Count III of the indictment which warrants the conclusion that the Grand Jury had in mind the extortion laws of Nevada [1/] and not those "of the United States". For the Court to have inserted in the indictment, the words (Sl. Op. 6), "violation of the Nevada statutes", is simply for the Court to have amended the indictment.

Certainly, the principle of Ex Parte Bain, 121 U.S. 1, 30 L.ed. 849, 7 S.Ct. 781, is, as recognized by the Supreme Court in Stirone v. United States, 361 U.S. 212, 217, 4 L.ed.2d 252, 256, 80 S.Ct. 270, still valid. In Bain, the Court said (121 U.S. at 10): "If it lies within the province of a court to change the charging part

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1/ Or even of California's or some other state's.

of an indictment to suit its own notion of what it ought to have been, or what the grand jury would probably have made if their attention had been called to the suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed."

Furthermore, with reference to this Court's statement (Sl. Op. 3) that Count III applies "to acts in Nevada alone" (emphasis added), there is nothing in the general allegations (CT 6, lines 10-15) as to the "thereafter" acts to be performed or attempted to be performed, nor in the specific acts alleged in the Count (CT 6, lines 16-18), from which even an inference could be drawn that those acts were committed or attempted to be committed in Nevada and not in California or some other state. Thus, appellant now stands convicted "upon a charge not made", and, therefore, in "sheer denial of due process". (De Jonge v. Oregon, 299 U.S. 353, 362.)

Moreover, Count III is not saved, as this Court apparently thought it could be (Sl. Op. 6), by the Court's reference to Count I which (ibid) "charged the extortion was illegal under the laws of Nevada and California". To so do flies directly in the teeth of this Court's holding in Walker v. United States, 176 F. 2d 796, 798 (1949).

In addition, this Court's amendment violates due process. Thus, this Court said (Sl. Op. 6) that "Count III ... would necessarily require a violation of ... Title 16, Nevada Revised Statutes, §205.315 or 205.325)." (footnotes omitted; emphasis added). In

other words, Count III, according to this Court's interpretation thereof, alleges a violation of either §205.315 or §205.325. Such a disjunctive charge is not permissible. While it is true that the Grand Jury may charge in the conjunctive, it is equally true that not even the Grand Jury may charge in the disjunctive. (United States v. Clarke, 20 Wall [U.S.] 92, 22 L.ed. 320, 322.)

## CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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FRED OKRAND

Attorneys for Appellant, Marshall.

## CERTIFICATE

I certify that the above Petition for Rehearing is, in my judgment, well founded and that it is not interposed for delay.

/s/ Fred Okrand

FRED OKRAND